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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 913

ADIRONDACK TRANSIT LINES, INC.,
Appellant,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

STATEMENT OPPOSING JURISDICTION AND MOTION TO AFFIRM BY APPELLEES, MANHATTAN COACH LINE, INC., ET AL.

HENRY P. GOLDSTEIN,
Counsel for Appellees,
Manhattan Coach Line, Inc., et al.

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IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

CIVIL 26-508

ADIRONDACK TRANSIT LINES, INC.,
Plaintiff-Appellant,

vs.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, ET ALS.,
Defendants-Appellees.

STATEMENT OPPOSING JURISDICTION AND MOTION TO AFFIRM DECREE AND JUDGMENT OF STATUTORY COURT

Statement Against Jurisdiction

Pursuant to Rule 12, Paragraph 3 of the Supreme Court Rules, Manhattan Coach Line, Inc., Manhattan Transit Company, Westwood Transportation Co. Inc., Westwood Transportation Line Inc., Inter-City Transportation Co. Inc., Jersey City & Lyndhurst Bus Co. Inc., and Mountain Transit Corporation, intervenor-defendants and appellees herein, present this Statement Against Jurisdiction, and respectfully submit that the questions involved in the instant appeal to the United States Supreme Court are so insubstantial as not to need further argument

Facts

This is a suit filed by plaintiff to set aside a portion of an order of the Interstate Commerce Commission (par. I com-

plaint) which directs the plaintiff to cease and desist from its operations between New York, N. Y., and Weehawken, N. J., via the Lincoln Tunnel, and, in Weehawken, N. J., between the New Jersey entrance to the Lincoln Tunnel over Boulevard East to its junction with Pershing Road. The order, dated June 6th, 1944, stated:

> "We conclude that the term 'unnumbered roads to Weehawken', in defendant's certificate, should be construed to mean the roads, highways, and streets over which defendant was operating on the statutory date and continously thereafter until the effective date of its certificate, and that the above-described departure from such routes, including service at intermediate points between Pershing Road and the Tunnel entrance, subsequent to the effective date of its certificate is unauthorized thereunder. We further conclude that the term 'thence across the Hudson River to New York', in defendant's certificate, refers to the method of crossing employed by it on the statutory date and on the effective date of its certificate in No. MC-2835, namely, the ferry, and does not authorize operation through the Lincoln Tunnel."

and:

> "On reconsideration, we find that, in discontinuing operations over Pershing Road and the ferry, defendant has willfully failed to comply with the terms of its certificate in No. MC-2835; that its operation between the junction of Hudson Boulevard East and Pershing Road, in Weehawken, N. J., and New York, N. Y., over Hudson Boulevard East, serving intermediate points, and through the Lincoln Tunnel is unauthorized; and that such unauthorized operation is unlawful in violation of section 206(a) of the act."

The complaint is not specific as to the portions of the Commission's report and findings it objects to, but ob-

viously from its general wording it would refer to those portions of the aforequoted, which state:

> "We further conclude that the term 'thence across the Hudson River to New York', in defendant's certificate, refers to the method of crossing employed by it on the statutory date and on the effective date of its certificate in No. MC-2835, namely the ferry, and does not authorize operation through the Lincoln Tunnel."

in the first quotation, and all of the second quotation. The order of June 6th, 1944, also reads as follows:

> "With respect to operation through the Tunnel, defendant contends, on reply, that while we could not certify that public convenience and necessity required operation through a non-existent facility, we could and did grant to defendant, by the use of the term: '* * * and thence across the Hudson River * * *,' a sufficiently broad authority to permit the defendant to change its route and make use of such facility, if, as, and when the same became available.
>
> "Obviously this contention is untenable. The 'grandfather' clause of section 206(a) of the act contemplates only the authorization of such bona fide operations as were engaged in on June 1, 1935, and continuously since, over the route or routes (insofar as is here pertinent) for which application is made. Whatever the intention may have been in incorporating the previously described description in defendant's 'grandfather' certificate, plainly such certificate cannot be construed to authorize an operation which was not being conducted at the time the certificate was issued, and could not have been conducted at that time or prior thereto. It will be noted, moreover, that the authority set forth in defendant's certificate is predicated upon the finding in the initial paragraph thereof; '* * *; that the said applicant was in bona fide operation over said routes on June 1, 1935, and has so operated since * * *'."

The complaint alleges in substance that the plaintiff has the right to conduct those operations by virtue of the issuance to it of a Certificate of Convenience and Necessity in proceedings before the Commission, Docket No. MC-2835, annexed to the complaint and marked Exhibit A. The Commission in its report points out that the certificate also contains a provision: "That the said applicant was in a bona fide operation over said route on June 1, 1935, and has so operated since * * *." It also states that the certificate was issued: "in accordance with the requirements of Section 206 of the Motor Carrier Act, 1935."

The report and order of the Commission of June 6th, 1944, was the result of a complaint by certain motor carriers operating between New York and points in New Jersey (appendix A, answer of intervenors, Manhattan Coach Line Inc., et als.). They alleged in that complaint as follows:

> "1. The complainants are holders of certificates[1] of convenience and necessity issued pursuant to Sections 206 and 207 of the Motor Carrier Act and are engaged in the transportation of passengers, their baggage and express, in a short haul, regular route service, between points in Bergen, Hudson and Passaic Counties, New Jersey and New York City; portions of Bergen and Hudson Counties through which they operate being the territory through which the defendant conducts its operations.
>
> "2. The defendant is a long haul common carrier[2] engaged in the transportation of passengers and their baggage between New York City and points in New

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1 Manhattan Transit Company, MC-3700, MC-3700 Sub. 1.
Manhattan Coach Lines, Inc., MC-3699, MC-3699 Sub. 1.
Westwood Transportation Company, MC-3701, MC-3701 Sub. 1.
Westwood Transportation Lines, Inc., MC-3705, MC-3705 Sub. 1.

2 Adirondack Transit Lines, Inc., MC-2835.

York State through the State of New Jersey and is subject to the provisions of the Motor Carrier Act.

"3. Prior to December 22nd, 1937, the defendant, in the course of its long haul business, operated its lines from the Borough of Manhattan, City of New York, across the Hudson River via the 42nd Street Ferry to Weehawken, New Jersey. From Weehawken, N. J., it then proceeded northerly through Hudson and Bergen Counties to the State line of New Jersey and New York to its destination points in that State.

"4. On June 4th, 1937, a certificate of convenience and necessity, in accordance with the rules of procedure governing informal hearing, was issued to the defendant for the service it was then rendering, and insofar as portions thereof are pertinent to this complaint, it reads as follows: 'Across the Hudson River to Weehawken, New Jersey and then across unnumbered roads from Weehawken, New Jersey to New Jersey Highway 1, thence over New Jersey Highway S-5 to the junction of New Jersey Highway S-5 and over U. S. Highway 46' continuing from there to far distant points.

"5. The defendant, unlike most of these short haul operators using the Lincoln Tunnel at the present time, was and is still a long haul operator concerned with the transportation of passengers from points in New York State, north of the State of New Jersey on the one hand, to points in New Jersey and New York City on the other hand, and from New York City and points in New Jersey on the one hand as described in the certificate, to points in New York State, north of New Jersey.

"6. The findings of the Interstate Commerce Commission, as set forth in the certificate issued defendant named herein, were based on the report and recommendation of the District Supervisor who presided at the informal hearing on defendant's application. Therefore, the certificate should be interpreted

and defendant's operating rights determined in accordance with the intent of the District Supervisor, as set forth in his recommended report.

"Since the Lincoln Tunnel was not opened to the public until December 1937, and ferry transportation was the only transportation communication between Weehawken, N. J. and New York City, at the time, the phrase 'and unnumbered roads to Weehawken, N. J., and thence across the Hudson River to New York, and return over the same route,' should be interpreted as reading, 'to Weehawken, N. J., thence by ferry to New York City, and return over the same route.' It is improbable that the District Supervisor recommended a future right based on a different set of facts, or that the Commission would issue an order granting a right to operate over a non-existing route, i.e., from Weehawken, N. J. to New York City via the Lincoln Tunnel.

"7. A description of the route in Bergen and Hudson Counties, as set forth in the certificate, was never intended as an authorization to the defendant herein to engage in competition with short haul operators between New York City and points in Hudson and Bergen Counties. Again, the report and recommendation of the Supervisor should be referred to, to interpret the wording of the certificate in determining the extent of authority granted the defendant. The indefinite description of routes was not intended to permit defendant to engage in short haul operations and service between New York City and commuting points in nearby New Jersey, as is conducted by the complainants herein, but was so described as to permit defendant to retain a flexible operating right for the purpose of complying with local ordinances and laws governing operations of public vehi es in the communities through which it was required to pass in conducting its long haul operations.

"By defendant's arbitrary and unauthorized use of the Lincoln Tunnel as a method of communicating between Weehawken and New York City, it has

changed *its type of service* to interurban transportation and cannot be considered to have increased its legitimate service and facilities in accordance with its certificate.

"8. The complainants herein have been pioneer operators in the area covered in their certificates developing the short haul and interurban transportation system therein since 1922. They have at great sacrifice, experience and expense, developed an efficient and satisfactory service for the benefit of the public and prior to the opening of the Lincoln Tunnel have made great financial sacrifices to maintain that service.

"During this period of time, numerous long haul bus lines, such as Greyhound and others, have, of necessity, been running their routes through this area via the 42nd Street Ferry but have not been engaged in any short haul or suburban type of business. The defendant herein is in the category of the long haul operator such as Greyhound and while it has, of necessity, operated its buses through this area, it has not been engaged in any bona fide short haul business which it now attempts to claim by interpretation and cursory reading of the certificate issued to it.

"9. The use of the Lincoln Tunnel in lieu of the 42nd Street Ferry and specific designation of routes in Hudson and Bergen Counties in motor bus operations were the subject of protracted hearings in the so called Lincoln Tunnel cases, 12 M.C.C. 184, wherein it was decided definitely that the use of the Lincoln Tunnel required the proof of convenience and necessity, that routes in Hudson and Bergen Counties in service to Manhattan via the Lincoln Tunnel must be specifically designated, and that the right to use streets and highways previously not used also required the proof of convenience and necessity.

"The complainants were put to tremendous expense in the determination of these questions and they are, at the present time, conducting their operations in compliance with the determinations made thereunder.

They were compelled to and did prove public convenience and necessity for the use of the Lincoln Tunnel and such additional streets which they had not previously traversed.

"10. Since December 22nd, 1937, the defendant has discontinued to cross the Hudson River by the use of the 42nd Street Ferry and has been operating its services from mid-Manhattan to Hudson County via the Lincoln Tunnel under the Hudson River and has been traversing and using streets in Hudson and Bergen Counties now used by the complainants but never traversed by the defendant prior thereto.

The defendant has caused to be filed with the Interstate Commerce Commission new tariffs and is holding itself out to conduct a short haul business from points in Hudson and Bergen Counties to New York City via the Lincoln Tunnel.

"11. The complainants allege that the defendant by so doing has been conducting its operation since December 22nd, 1937 in deliberate disregard of the terms of the certificate of convenience and necessity issued to it.

"12. The defendant in operating in violation of the terms of its certificate and by the assumption of authority without having made application therefor is causing harm and damage to the complainants herein in that (a) it causes to be diverted short haul business to and from points in Hudson and Bergen Counties to New York City, which type of business it has at no time been entitled to as a matter of fact and pursuant to the records of the Interstate Commerce Commission as part of the certificate issued to it; (b) it is serving territory which it had not previously served; (c) it is holding out and engaging in a type of service never previously operated; (d) and is creating an unfair and destructive competitive situation.

"13. The operation in violation of the terms of the certificate have been deliberate and intentional and

have caused irreparable damage to the complainants and for that reason it is respectfully urged that pursuant to the authority in Section 212 of the Motor Carrier Act that the defendant be ordered (a) to immediately desist from operating through the Lincoln Tunnel and from engaging in the solicitation and handling of short haul business from points in Hudson and Bergen Counties to New York City and return; (b) that in the event that the defendant continues to operate in violation of the terms of the certificate and the intentions therein as contained in the records of the Interstate Commerce Commission, that its certificate be revoked and for any other and further relief that may be just and proper."

The matter of the complaint was set for hearing before an Examiner who accepted evidence and Division 5 of the Commission, on April 16th, 1943, made no finding of unlawful operation with respect to plaintiff's operation between Fairview and New York City over unnumbered roads or across the Hudson River via the Lincoln Tunnel. Complainants in the proceedings before the Commission petitioned for reconsideration and the entire Commission made its determination on June 6th, 1944, which is the matter being attacked herein.

Statutes Involved

The following sections of the Interstate Commerce Act are pertinent herein:

Section 206(a). Except as otherwise provided in this section and in section 210a, no common carrier by motor vehicle subject to the provisions of this part shall engage in any interstate or foreign operation on any public highway, or within any reservation under the exclusive jurisdiction of the United States, unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the

Commission authorizing such operations: *Provided, However, That,* subject to section 210, if any such carrier or predecessor in interest was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time, or if engaged in furnishing seasonal service only, was in bona fide operation on June 1, 1935, during the season ordinarily covered by its operation and has so operated since that time, except in either instance as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall issue such a certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission as provided in paragraph (b) of this section and within one hundred and twenty days after this section shall take effect, and if such carrier was registered on June 1, 1935, under any code of fair competition requiring registration, the fact of registration shall be evidence of bona fide operation to be considered in connection with the issuance of such certificate. Otherwise, the application for such certificate shall be decided in accordance with the procedure provided for in section 207(a) of this part and such certificate shall be issued or denied accordingly. Pending the determination of any such application the continuance of such operation shall be lawful * * *.

Sec. 207(a). Subject to section 210, a certificate shall be issued to any qualified applicant therefor authorizing the whole or any part of the operations covered by the application, if it is found that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this part and the requirements, rules and regulations of the Commission thereunder, and that the proposed service, to the extent to be authorized by the certificate, is or will be required by the present or future public

convenience and necessity; otherwise such application shall be denied: *Provided, however, That* no such certificate shall be issued to any common carrier of passengers by motor vehicle for operations over other than a regular route or routes, and between fixed termini, except as such carriers may be authorized to engage in special or charter operations.

Sec. 208(a). Any Certificate issued under section 206 or 207 shall specify the service to be rendered and the routes over which, the fixed termini, if any, between which, and the intermediate and off-route points, if any, at which, and in case of operations not over specified routes or between fixed termini, the territory within which, the motor carrier is authorized to operate; and there shall, at the time of issuance and from time to time thereafter, be attached to the exercise of the privileges granted by the certificate such reasonable terms, conditions, and limitations as the public convenience and necessity may from time to time require, including terms, conditions, and limitations as to the extension of the route or routes of the carrier, and such terms and conditions as are necessary to carry out, with respect to the operations of the carrier, the requirements established by the Commission under section 204(a)(1) and (6); *Provided, however, That* no terms, conditions, or limitations shall restrict the right of the carrier to add to his or its equipment and facilities over the routes, between the termini, or within the territory specified in the certificate, as the development of the business and the demands of the public shall require.

Sec. 204(a)(6). To administer, execute, and enforce all provisions of this part, to make all necessary orders in connection therewith, and to prescribe rules, regulations, and procedure for such administration;
* * *

Sec. 205(h). All the provisions of section 17 of part I shall apply to all proceedings under this part.

Sec. 17(3). The Commission shall conduct its proceedings under any provision of law in such manner as will best conduce to the proper dispatch of business and to the ends of justice.

ARGUMENT

Point I

The only question presented is whether the Commission properly interpreted a certificate which it issued to the plaintiff and in so doing directed the plaintiff to cease from conducting an operation and service which it did not perform on June 1, 1935, and thereafter.

The Commission in respect thereto states as follows:

"With respect to operation through the Tunnel, defendant contends, on reply, that while we could not certify that public convenience and necessity required operation through a non-existent facility, we could and did grant to defendant, by the use of the term: '* * * and thence across the Hudson River * * *', a sufficiently broad authority to permit the defendant to change its route and make use of such new facility, if, as, and when the same became available.

Obviously this contention is untenable. The 'grandfather' clause of section 206(a) of the act contemplates only the authorization of such bona fide operations as were engaged in on June 1, 1935, and continuously since, over the route or routes (insofar as is here pertinent) for which application is made. Whatever the intention may have been in incorporating the previously described description in defendant's 'grandfather' certificate, plainly such certificate cannot be construed to authorize an operation which was not being conducted at the time the certificate was issued, and could not have been conducted at that time or prior thereto. It will be noted, moreover, that the authority set forth in defendant's certificate is predicated upon the finding in the initial paragraph thereof; '* * *;

that the said applicant was in bona fide operation over said routes on June 1, 1935, and has so operated since * * *.'"

There is no dispute as to the facts. The plaintiff did not operate via the tunnel and the prohibited streets in Weehawken prior to December 22nd, 1937, but has been operating over them since that time picking up and discharging passengers. The complaint (paragraph XIII) alleges in substance that from the date of the opening of the Lincoln Tunnel, the petitioner has been using the same and that travel between Weehawken, N. J. and New York City via the Lincoln Tunnel and the connecting highways in New Jersey is a considerably faster and more convenient route than that offered by the ferries; that it is much quicker, more expeditious, and that the ferry is considered antiquated and inconvenient; that the tunnel is not affected by fog and other conditions of the weather; that the ferry is subject to delays created by fog and other conditions.

Treating with the identical subject matter in applications involving the use of the Lincoln Tunnel, the Commission in 12 M. C. C. 184 stated as follows:

(Page 196):

"Upon this record, it is clear that the operation of applicants on Boulevard East between the Forty-Second Street ferry and the tunnel, over which intermediate service was rendered, is an extension of route resulting in a substantial increase in service. As above indicated, the operation through the tunnel results in a substantial saving in operating time. The benefits therefrom accrue from the use of an entirely new type of public facility and are of such a nature that a radical change in the riding habits of the public will ensue to the detriment of all facilities which do not use the tunnel but cater to the same traffic. Under these circumstances, and in view of our conclusions herein concerning the need for specific designation of streets, we are of the

opinion, and so find, that the operation through the tunnel constitutes a new service for which public convenience and necessity must be proved before a certificate may be issued authorizing such operation."

In so doing, it had rejected the identical argument presented here which the carriers involved in those proceedings had advanced. It adopted the same ruling in all subsequent applications involving the use of the Lincoln Tunnel, amongst which were:

Pennsylvania Greyhound Lines and *Central Greyhound Lines*, 30 M. C. C. 373;
Lincoln Transit Co. Inc., MC-58915 Sub. 3;
Atlantic Coast Lines Inc., MC-84675 Sub. 1;
Asbury Park-New York Transit Corporation, MC-1002 Sub. 1;
Coastal Cities Coach Company, MC-29682 Sub. 1;
Quaker City Bus Co., MC-265 Sub. 1;
Public Service Interstate Transportation Company, MC-3647 Sub. 16;
Northern Trails Inc., MC-39957 Sub. 1;
Eastern Trails Inc., MC-18975 Sub. 2;
Safeway Trails Inc., MC-84728 Sub. 2;
Frank Martz Coach Co., MC-3600 Sub. 1;
Central Greyhound Lines, MC-1503 Sub. 28;
Central Greyhound Lines, MC-1503 Sub. 29.

In one of those decisions decided as late as February 16th, 1943, Docket No. MC-228, the application of *Hudson Transit Lines*, they reaffirmed their position by stating as follows:

"Although applicant claims that the proposed Lincoln Tunnel route would be a change in operation only and not a change in service, the record shows otherwise. Since applicant has been using this route, its service has greatly increased. Prior to the opening of the Lincoln Tunnel applicant had no terminals or stops or

ticket agents in New Jersey. Thereafter stations at which tickets could be purchased were opened on the route between Paramus and the New Jersey-New York State line, and passengers are picked up and discharged on that part of the highway. Applicant is now doing a large business between points on the highway north of Paramus and New York City, obviously brought about by the savings in running time occasioned by use of the new route. We are of the opinion that the change in route has resulted in a substantial change in service and that before applicant may be authorized to engaged in the transportation thereover of express and newspapers it must establish proof of public convenience and necessity. Compare *Lincoln Tunnel Applications, supra.*"

The effect of these decisions and determination by the Commission simply stated is that the use of the Lincoln Tunnel and streets not operated on June 1, 1935, the statutory "grandfather" date, were subject to the provisions of Section 207 of the Act requiring the proof of convenience and necessity therefor.

Section 208 of the Motor Carrier Act specifies that any certificate issued under either Section 206 or 207 shall specify, amongst other things, the routes over which, the fixed termini, if any, between which and the intermediate and off-route points, if any, at which, the motor carrier is authorized to operate. Section 206 (a) says that subject to Section 210 if any carrier or predecessor in interest was in bona fide operation on June 1, 1935, over the route or routes for which application is made and has so operated since that time, then the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served. The wording of the certificate issued by the Commission cannot be interpreted to contain any greater authority than that which the Commission found in any proceedings before it to have been operated

by the holder thereof on June 1, 1935, and where it is found that certain operations, streets, or routes, not operated or used on the statutory date were sought to be used, that there would have to be a compliance with section 207.

The plaintiff herein saw fit to give its own interpretation to the authority contained in the certificate and in so doing assumed all of the risks incidental to the institution of an operation without authority from the Commission. In fact, it received notice by competitive carriers in the territory that its interpretation was improper and that the newly instituted operations were unlawful by the position taken before the Commission at the first informal conference and the mailing of a letter by registered mail on June 28th, 1937, and after the institution of the service by the filing of the complaint on January 15th, 1940.

The United States Supreme Court has already determined that operating authority pursuant to Section 206 can be no greater than the service rendered on June 1, 1935.

United States v. *Maher*, 307 U. S. 148, 152-153:

> "On the merits the case brings into question the validity of the construction placed by the Interstate Commerce Commission upon Section 206 (a) of the Motor Carrier Act relieving carriers operating on June 1, 1935, under the circumstances defined by the terms of Section 206 (a) from the requirements of Section 207. The latter section requires a finding by the Commission that the granting of such a certificate is demanded by public convenience and necessity. But under Section 206 (a) the Commission must issue 'such certificate without requiring further proof that public convenience and necessity will be served' by an applicant who 'was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that

time.' By this legislation Congress responded to the felt need for regulating interstate motor transportation through familiar administrative devices, while at the same time it satisfied the dictates of fairness by affording sanction for enterprises theretofore established."

Page 155:

"The recognized practices of an industry give life to the dead words of a statute dealing with it. In differentiating between operations over the 'route or routes' for which an application under the 'grandfather' clause is made as against operation 'within the territory,' Congress plainly adopted the familiar distinction between 'anywhere-for-hire' bus operations over irregular routes and regular route bus operations between fixed termini. Such recognition is implicit also in the provisions of Section 208 (a) 49 U.S.C.A. # 308(a), that 'Any certificate issued under section (306 or 307) 206 or 207 shall specify the service to be rendered and the routes over which, the fixed termini, if any, between which, and the intermediate and off route points, if any, at which, and in case of operations not over specified routes or between fixed termini, the territory within which, the motor carrier is authorized to operate."

United States et al. v. *Carolina Freight Carriers Corp.*, 315 U. S. 475, 480:

"We think the Commission was justified in the restrictions which it placed on the geographical scope of appellee's operations. Sec. 206(a) of the Act authorizes the Commission to issue a certificate without a showing of public convenience and necessity if the carrier or its predecessor was 'in bona fide operations as a common carrier by motor vehicle on June 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time.' Sec. 208 (a) requires that the certificate specify 'the routes over which, the fixed ter-

mini, if any, between which, and the intermediate and off route points, if any, at which and in case of operations not over specified routes or between fixed termini the territory within which, the motor carrier is authorized to operate.' It is clear from these provisions that the power of the Commission to authorize future operations within a designated 'territory' rather than over specified routes or between fixed termini, fits the peculiar requirements of irregular route operators such as appellee. Authority to operate within a specified 'territory' may include permission to service all points in that area. On the other hand it may be restricted to designated points therein. Or as in the instant cases, it may extend to all points in a part of that area, and to selected localities in another part. The precise delineation of the area or the specification of localities which may be serviced has been entrusted by the Congress to the Commission. Alton R. Co. v. United States, 315 U. S. 15, 62 S. Ct. 432, 86 L. Ed. —. The act, provides the test of 'bona fide operation.' That standard carries the connotation of substantiality. It also makes clear that a holding out to service a specified area is not alone sufficient. It is 'actual rather than potential or simulated service' which is required. McDonald v. Thompson, 305 U. S. 263, 266, 59 S. Ct. 176, 178, 83 L. Ed. 164."

Page 483 says:

"Sec. 206 (a) requires a showing that the applicant or its predecessor, was 'in bona fide operation as a common carrier' on June 1, 1935, and 'since that time.' By # 208 (a) the certificate must specify 'the service to be rendered' by the carrier."

Noble v. *U. S.*, 319 U. S. 88, 91, 92:

"• • • Keystone Transp. Co. Contract Carrier Application, 19 M.C.C. 475. In the latter case the power and duty of the Commission under Sec. 209 (b) to specify in the permit the 'business of the contract carrier covered thereby and the scope thereof' were

reexamined. It was held that that phrase meant 'more than just the business of being a contract carrier within a defined territory. It is all-inclusive and connotes in addition to the business of being a contract carrier the exact and precise character of the service to be rendered by such carrier.' 19 M.C.C. 493.

"We agree. An accurate description of the 'business' of a particular contract carrier and the 'scope' of the enterprise may require more than a statement of the territory served and the commodities hauled. An accurate definition frequently can be made only in terms of the type of class of shippers served. Unless the words of the Act are given that interpretation, permits under the 'grandfather' clause may greatly distort the prior activities of the carrier. He who was in substance a highly specialized carrier for a select few would be treated as a carrier of general commodities for all comers, merely because he had carried a wide variety of articles. That would make a basic alteration in the characteristics of the enterprise of the contract carrier—a change as fundamental as we thought was effected by a disregard of the nature and scope of the holding out of the common carrier in United States v. Carolina Freight Carriers Corp., 315 U. S. 475, 62 S. Ct. 722, 86 L. Ed. 971. If the business of the contract carrier were not defined in terms of the type or class of shippers served, that 'substantial parity between future operations and prior bona fide operations' which is contemplated by the Act (Alton R. Co. v. United States, 315 U. S. 15, 22, 62 S. Ct. 432, 436, 86 L. Ed. 586) would be frequently disregarded. The 'grandfather' clause would be utilized not to preserve the position which the carrier has obtained in the nation's transportation system, but to enlarge and expand the business beyond the pattern which it had acquired prior to July 1, 1935. The result in the present case would be a conversion for all practical purposes of this contract carrier into a common carrier—a step which would tend to nullify a distinction which Congress has preserved throughout the Act. If

such a metamorphosis is to be effected or if the appellant is to obtain a permit broader than the actual scope of his established business, the showing required by other provisions of the Act must be made. See Sec. 206 (a), Sec. 207, and Sec. 209 (b)."

It has also determined that the Commission's construction of the language of the Motor Carrier Act is entitled to great weight, especially in view of the fact that it was the Commission which proposed that Act of Congress.

United States v. *American Trucking Association,* 310 U. S. 534, 549.

It is also the duty of the Commission to weigh the evidence and make a determination as to the extent of the factual operations, and its findings are conclusive.

Alton R. Co. v. *United States,* 315 U. S. 15, 23:

"Appellant railroad companies also urge that Fleming should not have been awarded any rights under the 'grandfather' clause in Washington, Oregon, and California. Before June 1, 1935, Fleming had made five deliveries to three different points in Washington, four deliveries to three different points in Oregon, and at least two deliveries to two different points in California. After June 1, 1935, and prior to the hearing in July, 1936, two deliveries were made in Washington, two in Oregon, and apparently several in California. These shipments did not appear to be merely nominal. Thus there was evidence that on and since June 1, 1935, Fleming had been in bona fide operation in those states. The weighing of such evidence involves in part a judgment based on the characteristics of the highly specialized transportation service involved. Thus, as we have said, that function is peculiarly one for the Commission not the Courts."

Rochester Telephone Corporation v. *U. S.*, 307 U. S. 125, 138-140:

"While the Interstate Commerce Commission had been in existence since 1887, the enlargement of its powers through the Hepburn Act in 1906, and the Mann Elkins Act in 1910, the establishment of similar agencies in many states following the lead of New York and Wisconsin, the widespread recognition that these specific instances marked a general movement, made increasingly manifest the place of administrative agencies in enforcing legislative policies and called for accommodation of the duties entrusted to them to our traditional judicial system. This Court 'ascribed' to the findings of the Commission 'the strength due to the judgments of a tribunal appointed by law and informed by experience.' Illinois Central R. R. v. Interstate Commerce Commission, 206 U. S. 441, 454, 27 S. Ct. 700, 704, 51 L. Ed. 1128. Recognition of the Commission expertise also led this court not to bind the Commission to common law evidentiary and procedural fetters in enforcing basic procedural safeguards.

"From these general considerations the Court evolved two special doctrines limiting judicial review of orders of the Interstate Commerce Commission. One is the primary jurisdiction doctrine, firmly established in Texas & Pacific Ry. v. Abilene Cotton Oil Co., 204 U. S. 426, 27 S. Ct. 350, 51 L. Ed. 553, Ann. Cas. 1075. Thereby matters which call for technical knowledge pertaining to transportation must first be passed upon by the Interstate Commerce Commission before a court can be invoked. The other is the doctrine of administrative finality. Even when resort to courts can be had to review a Commission's order, the range of issues open to review is narrow. Only questions affecting constitutional power, statutory authority, and basic prerequisites of proof can be raised. If these legal tests are satisfied, the Commission's order becomes incontestable. Interstate Commerce Commission v. Illinois Central R. R., 215 U. S. 452,

470, 30 S. Ct. 155, 160, 54 L. Ed. 280; Interstate Commerce Commission v. Union Pacific R. R., 222 U. S. 541, 32 S. Ct. 108, 56 L. Ed. 308."

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"The judicial function is exhausted when there is found to be a rational basis for the conclusion approved by the administrative body." Mississippi Valley Bargeline Co. v. United States, 292 U. S. 282, 286, 287, 54 S. Ct. 692, 693, 694, 78 L. Ed. 1260; Swayne & Hoyt, Lt. v. United States, 300 U. S. 297, 303 et seq., 57 S. Ct. 478, 480, 81 L. Ed. 659.

The plaintiff has never questioned the authority of the Commission as aforesaid or it would not have accepted the certificate issued to it. The Commission is the sole judge after hearing and the presentation of evidence to determine whether the use of a new tunnel or additional streets require the proof of convenience and necessity pursuant to Section 207.

North-South Freightways, Inc. v. *United States, et al.*, District Court, Southern District, New York, February 29, 1944, Vol. 55, No. 7 Fed. Supp., p. 698:

"Even if we were disposed to disagree with the result reached by the Commission, we cannot substitute our own judgment for that of an administrative agency especially constituted, empowered and competent to decide such issues. Gray v. Powell, 314 U. S. 402, 412, 62 S. Ct. 326, 86 L. Ed. 301; United States v. Carolina Freight Carriers Corp., 315 U. S. 475, 490, 62 S. Ct. 722, 86 L. Ed. 971."

In respect to the Lincoln Tunnel and the additional streets involved in the operation as conducted after December 22nd, 1937, particularly the Lincoln Tunnel and operations over Boulevard East between the Lincoln Tunnel entrance and Pershing Road in Weehawken, the Com-

mission has made its findings in 12 M.C.C. 184, *Lincoln Tunnel* cases, and all subsequent cases cited herein on pages 11-12, to the effect that the use thereof results in the institution of a substantially new service which requires an application pursuant to section 207. The plaintiff never filed an application therefor (excepting the one it filed after the determination by the Commission on June 6th, 1944, and which is now pending) and it is no different from any other carrier who desires to use those same new facilities. In fact, if the Commission had found that it was different that determination would have been discriminatory. In like manner, the Commission's findings that the expression, "and thence across the Hudson River" in a certificate issued pursuant to section 206 does not include authority which requires the proof of convenience and necessity under section 207.

Section 208 requires that the terminal points and route, in the instance of a regular route carrier, be specifically described. The evidence is clear, the plaintiff and the Commission have agreed, that the operation involved herein is that of a regular route, terminal-to-terminal one transporting passengers for hire. If more than one route or street was being operated on June 1, 1935, they all should have been described in the certificate. In this instance, the only route being used on that day between Weehawken and New York was the Weehawken ferry and the streets in Weehawken were Boulevard East to the intersection of Pershing Road, thence along Pershing Road to the ferry entrance. In proceedings, 12 M.C.C. 184, the Commission also stated:

> "The considered operations involve mass transportation service entirely within a metropolitan area. To a large extent the communities in New Jersey adjoin one another and a substantial part of the territory is served over city streets which extend through two or

more communities. If streets were not designated, in many instances the description of the routes would consist merely of a list of points served and it would be possible for an operator to change its route at will and serve territory which it had not previously served and in which another operator had developed traffic. The result would be unfair and destructive competitive practices and unstable and uncertain service to the public. The public interest requires that authorized routes shall not be changed arbitrarily, and operators are entitled to protection against unauthorized encroachments in their territories. Upon this record there is no showing that this result can be accomplished in the New Jersey territory without a complete designation of each route." (pp. 197 and 198.)

If it developed, where a certificate was issued, that the Commission's description of the route was given an interpretation by the holder thereof which resulted in the institution of a new and different service, the Commission had the duty of determining in an appropriate proceeding, or upon the complaint of a carrier, to make clear and concise that which it had intended by the use of the expression. This argument has been the position of the intervenors as complainants before the Commission from the inception of the proceedings and the Commission has done nothing more than clarify the "ambiguity" occasioned by the institution of the unlawful operation herein by the plaintiff. The same is not truly an ambiguity. It is the plaintiff's interpretation of the words, "and thence across the Hudson River" and its determination is not founded on section 206 and the decisions of the Commission. The Commission can interpret and determine the questioned meaning of any words or phrases but such interpretation must conform to the facts of operation on June 1, 1935, and its findings in other cases on the same subject matter.

It is noteworthy that the plaintiff does not attack any other portion of the order of June 6th, 1944. The order also

found that the expression "unnumbered roads to Weehawken" in defendant's certificate should be construed to mean the specific roads, highways and streets over which said defendant was operating on the statutory date and continuously thereafter until the effective date of its certificate. In that respect, the Commission stated in its report:

> "In the prior report division 5 concluded that the term 'unnumbered roads' is indefinite but that it clearly implies the term or condition '*over reasonably direct unnumbered roads*'; and that it does not appear that defendant is now operating over 'unnumbered roads' that are questionable under that interpretation. That interpretation, in effect, may be understood as meaning that the term 'unnumbered roads' is the equivalent of 'irregular routes.'
>
> "We know of no instance where we have authorized a common carrier of passengers by motor vehicle to operate in any manner other than over specified regular routes, except where we have authorized special or charter operations. In this connection it is pertinent to note that section 207 of the act requires that we limit certificates issued to such carriers to regular routes between fixed termini. The interpretation of the disputed term in the prior report would permit defendant to change at will, within certain undefined limits of circuity, the route traversed on the statutory date and thus to traverse highways and serve intermediate points thereon not then traveled nor served.
>
> "An examination of numerous reports 'grandfather' application proceedings wherein we have granted authority for operation over unnumbered roads discloses without question that the term has been generally used to mean specific unnumbered roads of highways over which the applicants concerned operated on the statutory date and continuously thereafter to the time of determination of the respective proceedings. Such highways are detailed in the applications and in the evidence, but no number or designation had been assigned to them by the govern-

mental authorities under whose jurisdiction they fall. For examples of such usage see *Blue Way Trailways Inc., Common Carrier Application,* 21 M.C.C. 421, 427; and *Interstate Transit Lines, Common Carrier Application,* 9 M.C.C. 758, 764."

The Commission stated that in the proceedings, MC-C-164, it was not concerned with the question of revoking or vacating defendant's certificate but only whether the operations complained of were authorized by the certificate which it issued.

If the Commission's interpretation of the expression, "unnumbered roads to Weehawken" is proper, then the plaintiff has conceded the authority of the Commission to so interpret and, if it has the authority to interpret one portion of the certificate, it has the authority to interpret another portion of the certificate.

Point II

The Commission having determined in a series of cases before it that the use of the Lincoln Tunnel and streets not operated over on June 1, 1935, required an application pursuant to Section 207, or in an emergency pursuant to Section 210 or 204, the plaintiff has adequate remedies available before the Commission which it in fact has exercised and has received relief thereunder.

The Commission in its report on June 6th, 1944, pointed out to the plaintiff as follows:

"The findings hereinafter made are without prejudice to the filing of an application by defendant under section 207 of the act, seeking authority to operate through the Lincoln Tunnel, or seeking temporary authority, under section 210 (a) of the act, as amended by the Second War Powers Act, 1942, for such operation during the pendency of such application filed under section 207,"

The plaintiff has filed with the Commission an application for the use of the Lincoln Tunnel pursuant to section 207, which has been assigned Docket No. MC-2835 Sub. 10, and has also filed application for temporary authority or war emergency authority, docket No. MC-2835 Sub. 11 W, pursuant to which application the Commission has granted temporary authority. The Commission's findings that the use of the Lincoln Tunnel and the additional streets in Weehawken requires such an application being conclusive as against all carriers, and the plaintiff having exercised its available remedies before the Commission which permits it to have the opportunity of acquiring a certificate, the plaintiff has an adequate remedy at law based upon the determination of the Commission after appropriate hearing thereunder.

WHEREFORE, it is respectfully prayed that the decree and judgment of the statutory court be affirmed.

Dated: New York, N. Y., December 13, 1944.

Respectfully submitted,

HENRY P. GOLDSTEIN,
Attorney for Intervenor-
Defendant-Appellees,
Manhattan Coach Line, Inc.,
Manhattan Transit Company,
Westwood Transportation Co. Inc.,
Westwood Transportation Line Inc.,
Inter-City Transportation Co., Inc.,
Jersey City & Lyndhurst Bus Co. Inc.,
Mountain Transit Corporation,
Office and P. O. Address 1450 Broadway,
Borough of Manhattan, City of New York.